

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6080

To be argued by
PATRICK H. SULLIVAN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

against

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION
and THE HARTFORD FIRE INSURANCE COMPANY,

Defendants,

and

AVIS, INC.,

Defendant-Intervenor-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR TRUSTEE-APPELLEE

F. TIMOTHY McNAMARA
Attorney for Trustee
102 Oak Street
Hartford, Connecticut 06106
(203) 249-8458

Of Counsel

WHITMAN & RANSOM
522 Fifth Avenue
New York, N.Y. 10036
(212) 575-5800

TABLE OF CONTENTS

TABLE OF AUTHORITIES	<u>Page</u> iii, iv, v,vi
STATEMENT OF FACTS.....	1
POINT I - THE COURT SHOULD DECLINE TO HEAR THIS APPEAL ON THE GROUND OF MOOTNESS.....	7
POINT II - THE DISTRICT COURT CORRECTLY DENIED FUQUA'S APPLICATION TO INTERVENE.....	13
A. The District Court Correctly Denied Fuqua Intervention As of Right.....	13
(1) Fuqua's Laches.....	14
(2) Fuqua's Lack of Interest in the Subject Matter.....	18
B. The District Court Correctly Denied Fuqua the Right to Intervene Permissively.....	27
POINT III - THIS COURT LACKS JURISDICTION TO HEAR THIS APPLICATION.....	29
POINT IV - THIS COURT HAS NO JURISDICTION TO AMEND TRUSTEE ORDER NO. 3.....	32
A. The district court has directed that there be a hearing on June 15, 1977, to consider amending Trustee Order No. 3 to permit the Trustee to dispose of his Avis stock through private sale and the issue is accordingly moot.....	32

B. The Court of Appeals cannot order the amendment of Trustee Order No. 3 since this issue was not raised before the court below.....	33
POINT V - INJUNCTIVE RELIEF IS WHOLLY INAPPROPRIATE IN THIS PROCEEDING.....	38
CONCLUSION.....	42

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.,</u> 112 F.2d 669 (2d Cir. 1940).....	15
<u>Arthur G. McKee & Co. v Gulf & Western Industries, Inc.,</u> 52 F.R.D. 332 (D. Del. 1971)	16, 25
<u>Arvida Corp. v. City of Boca Raton,</u> 59 F.R.D. 316 (S.D. Fla. 1973)	25
<u>Bersch v. Drexel Firestone, Inc.</u> 519 F.2d 974 (2d Cir. 1975), <u>cert</u> <u>denied</u> , 423 U.S. 1018 (1975).....	41
<u>Brewer v. Republic Steel Corp.,</u> 513 F.2d 1222 (6th Cir. 1975)	27, 28
<u>British Airways Bd. v. Port Auth.,</u> 71 F.R.D. 583 (S.D.N.Y. 1976)	29
<u>Capitol Temporaries, Inc. of Hartford v. Olsten Corp.,</u> 506 F.2d 658 (2d Cir. 1974)	41
<u>Cascade National Gas Corporation v. El Paso National Gas Company,</u> 386 U.S. 129 (1967)	21
<u>Caterpillar Tractor Co. v. International Harvester Co.,</u> 120 F.2d 82 (3d Cir. 1941)	40
<u>Chase Manhattan Bank v. Corporacion Hotelera de Puerto Rico,</u> 516 F.2d 1047 (1st Cir. 1975)	14
<u>Davis v. Jury Commission of Montgomery County,</u> 261 F.Supp. 591 (M.D. Ala. 1966)	29
<u>DiGiorgio v. Causey,</u> 488 F.2d 527 (5th Cir. 1973)	40
<u>Donson Stores, Inc. v. American Bakeries Co.,</u> 58 F.R.D. 481 (S.D.N.Y. 1973)	25
<u>Edmondson v. State of Nebraska,</u> 383 F.2d 123 (8th Cir. 1967)	26, 27

TABLE OF AUTHORITIES - CONTINUED

<u>Cases</u>	<u>Page</u>
<u>E.P. Hinkel & Co., Inc. v. Manhattan</u> <u>Co.</u> , 506 F.2d 201 (D.C. Cir. 1974)	12, 41
<u>Equal Employment Opportunity Commission v.</u> <u>United Airlines, Inc.</u> (7th Cir. 1975)	14
<u>Francis v. Chamber of Commerce of .. ed</u> <u>States</u> , 481 F.2d 192 (4th Cir. 1973)	27
<u>Gentry v. Hibernia Bank</u> , 154 F.Supp. 62 (N.D. Cal. 1956)	30
<u>Hedberg v. State Farm Mut. Automobile</u> <u>Ins. Co.</u> , 350 F.2d 924 (8th Cir. 1965)	12
<u>Hobson v. Hansen</u> , 44 F.R.D. 18 (D.D.C. 1968)	21
<u>Hodgson v. United Mine Workers</u> , 473 F.2d 118 (D.C. Cir. 1972)	26
<u>Hormel v. Helvering</u> , 312 U.S. 552 (1941)	34
<u>Hurwitz v. Directors Guild of America,</u> <u>Inc.</u> 364 F.2d 67 (2d Cir) cert. <u>denied</u> , 385 U.S. 971 (1966)	36
<u>Isbrandtsen v. S.S. Kokoh Maru, S.S. Kochu</u> <u>Maru</u> , 263 F.Supp. 784 (S.D.N.Y. 1966)	30, 31
<u>Korioth v. Briscoe</u> , 523 F.2d 1271 (5th Cir. 1975)	28
<u>Levin v. Mississippi River Corporation,</u> 47 F.R.D. 294 (S.D.N.Y. 1969)	26
<u>Local 8-6, Chemical & Atomic Workers</u> <u>v. Missouri</u> , 361 U.S. 363 (1960)	12
<u>Loew's Drive-In Theatres v. Park-In</u> <u>Theatres</u> , 174 F.2d 547 (1st Cir. 1949).....	40
<u>Meccano Ltd. v. John Wanamaker</u> , 250 Fed. 450 (2d Cir. 1919) <u>aff'd</u> , 253 U.S. 136 (1920)	36
<u>NAACP v. New York</u> , 413 U.S. 345 (1973)	14, 15
<u>Nevilles v. Equal Employment Opportunity</u> <u>Commission</u> , 511 F.2d 303 (8th Cir. 1975)	14, 18

TABLE OF AUTHORITIES - CONTINUED

<u>Cases</u>	<u>Page</u>
<u>Old Colony Trust Co. v. Penrose Industries Corp.</u> , 387 F.2d 939 (3d Cir.), <u>cert. denied</u> , 392 U.S. 927 (1968)	18, 20
<u>Overseas Trading Corporation v. Clumberhall</u> , 85 F. Supp. 905 (S.D.N.Y. 1949)	31
<u>Reedsburg Bank v. Apollo</u> , 508 F.2d 995 (7th Cir. 1975)	30
<u>Schwartz v. S.S. Nassau</u> , 345 F.2d 465 (2d Cir.) <u>cert. denied</u> , 382 U.S. 919 (1965)	34
<u>Securities and Exchange Com'n v. Bloomberg</u> , 299 F.2d 315 (1st Cir. 1962)	15, 18
<u>Securities and Exchange Commission v. Everest Management Corp.</u> , 475 F.2d 1236 (2d Cir. 1972)	27
<u>Shapiro, Bernstein & Co. v. Continental Record Co.</u> , 386 F.2d 426 (2d Cir. 1967)	39
<u>Sheridan v. Liquor Salesmen's Union</u> , 444 F.2d 393 (2d Cir. 1971)	40
<u>Solien v. Miscellaneous Drivers & Helpers Union Local No. 610</u> ; 440 F.2d 124 (8th Cir.) <u>cert. denied</u> , 403 U.S. 905 (1971)	24
<u>Sonesta International Hotels Corp. v. Wellington Associates</u> , 483 F.2d 247 (2d Cir. 1973)	38
<u>Terkildsen v. Waters</u> , 431 F.2d 201 (2d Cir. 1973)	34
<u>United States v. Associated Milk Producers</u> , 534 F.2d 113 (8th Cir. 1976)	14
<u>United States v. International Business Machines Corp.</u> , 62 F.R.D. 530 (S.D.N.Y. 1974)	15, 16
<u>United States v. 936.71 Acres of Land, State of Fla.</u> , 418 F.2d 551 (5th Cir. 1969)	20

TABLE OF AUTHORITIES - CONTINUED

<u>Cases</u>	<u>Page</u>
<u>United States v. Vitasafe Corp.</u> , 352 F.2d 62 (2d Cir. 1965)	34
<u>Vazman S.A. v. Fidelity International</u> <u>Bank</u> , 418 F.Supp. 1084 (S.D.N.Y. 1976)	14
 <u>Other:</u>	
Federal Rules of Civil Procedure, Rule 24	13, 27
7 Moore's <u>Federal Practice</u> ¶ 65.21 (3d Ed. 1975)	12
Note, <u>Intervention</u> , 89 <u>Harv. L.Rev.</u> 1174 (1976)	23

STATEMENT OF FACTS

On January 6, 1975, Richard Joyce Smith was appointed Trustee by the United States District Court, District of Connecticut, to manage and dispose of International Telephone & Telegraph Corporation's undivested interest in Avis, Inc. ("Avis") and its subsidiaries. The order which appointed the Trustee also directed that until the consummation of a plan of divestiture the Trustee was to vote the Avis stock held by him at his discretion, having in mind the best interests of the shareholders of Avis. (65a)*

Accordingly, the Trustee then began a complete study of Avis and retained financial advisors to assist him in this regard. (67a)

In the fall of 1975, the Trustee's financial advisors reported that in their opinion the Trust Property, which then comprised some 63% of the outstanding shares of Avis, should be disposed of by a series of public offerings commencing in 1976 subject to market conditions existing at the time of said offerings. (68a) After a hearing on the matter, the district court, through Trustee Order No. 3, directed the Trustee to begin the disposition of the

* References to numbers in parentheses are to pages in the Joint Appendix unless otherwise indicated.

Trust Property by way of a series of public offerings and on May 27, 1976 the Trustee sold 1,250,000 shares of Avis common stock for the sum of \$9.25 per share thereby reducing the Trust Property to 47% of the outstanding shares of Avis. (69a, 70a)

At a meeting of the Board of Directors of Avis held on January 25, 1977 the Trustee advised the Avis Board of his intention to make a second public offering of the Trust Property around mid-year 1977 and recommended to the Board that it consider the implementation of measures to protect Avis against undesirable attempts by others to acquire control of the Company. Thereafter, the Trustee sought Court approval of certain anti-takeover provisions and on May 3, 1977 the district court issued Trustee Order No. 5 finding: "It is within the discretion of the Trustee to vote his Avis shares in favor of items (2) and (3) [the anti-takeover provisions] which are being submitted for stockholder consideration at the forthcoming 1977 Annual Meeting of Stockholders of Avis and otherwise at his discretion, having in mind the best interests of the stockholders of Avis in their capacity as such". (72a, 74a)

The Avis proxy-soliciting material was mailed to shareholders on May 4, 1977. That material contained the anti-takeover provisions (items 2 and 3 referred to in

Trustee Order No. 5) and on May 17, 1977 a Registration Statement for the proposed sale of 2,000,000 shares of the Trust Property was filed with the Securities and Exchange Commission in Washington, D.C. (74a-76a)

On the same date at approximately 5:00 PM, a letter from the attorneys for Fuqua Industries, Inc. ("Fuqua") was delivered to the Trustee's office which stated in substance that Fuqua intended to make a conditional offer to purchase the entire Trust Property of 3,743,504 shares of Avis common stock. (76a, 99a-100a) That letter also stated that, in light of Fuqua's proposed offer, the aforementioned proxy material should be updated and the Annual Meeting delayed. On May 18, 1977, the Trustee responded to the Fuqua proposed conditional offer, stating in substance that he was continuing his program for the public distribution of the Trust Property as directed by the Court. (75a, 102a) Later that day, Fuqua's attorneys served an Order to Show Cause and supporting papers which were returnable before the district court in Hartford, Connecticut, on May 23, 1977. (76a, 17a) The relief sought by Fuqua in the district court was an order:

1. Granting an application of Fuqua to intervene in the proceedings;
2. Enjoining the Trustee and Avis from voting any shares of Avis common stock in favor of the anti-takeover provisions at the Annual Meeting of Avis

Stockholders scheduled for May 25, 1977 and from soliciting any proxies with respect thereto; and

3. Enjoining Avis from holding the aforementioned Annual Meeting of its Stockholders.

After hearing oral argument from both sides and having reviewed all of the affidavits submitted, the court below denied Fuqua's application in its entirety. The following day, May 24, 1977, Fuqua was before this Court in connection with an application to stay the meeting of shareholders then scheduled for May 25, 1977 pending appeal to this Court. This Court denied Fuqua's application for a stay of the Annual Meeting without prejudice to the merits of the appeal and granted Fuqua's application for an expedited appeal.

On May 25 the Annual Meeting of Avis stockholders was held and items 2 and 3 were adopted.

On Friday, June 3, 1977, the Trustee was advised by representatives of Norton Simon, Inc. ("NSI") that subject to a favorable vote by the Board of Directors of that Company, it was prepared to make a cash offer of \$20.25 per share for the 3,743,504 shares held by the Trustee. That offer was received by the Trustee on Monday, June 6, 1977, and it also contained a commitment by NSI either to make a cash tender

offer for all of the other Avis shares outstanding for \$20.25 per share or to affect a cash merger with a wholly-owned subsidiary of NSI in the same amount. (Trustee - Appellee's Supplemental Appendix 341a)

Thereafter, the Trustee submitted his Fifth Report to the district court stating that, in his view, the offer was fair and advantageous to all Avis shareholders and requesting the court to issue its order authorizing and directing the Trustee to accept NSI's offer. (Trustee - Appellee's Supplemental Appendix 341a) Accordingly, on June 7, 1977, the district court ordered that a hearing be held on June 15, 1977 to consider the NSI proposal in lieu of the public offering program contemplated by Trustee Order No. 3. In connection with that hearing the Court directed that notice be given to all parties. (Trustee - Appellee's Supplemental Appendix 347a) Notice, in fact, was given to Fuqua by ordinary mail on June 7, 1977.

At the Trustee's request, Avis filed a withdrawal of the Registration Statement which contemplated the sale of 2,000,000 shares to the public in mid-June 1977. (Trustee - Appellee's Supplemental Appendix 339a)

For reasons which will hereinafter be discussed, all of the issues raised by Fuqua in the court below as well

as those raised for the first time in this Court are moot
and this Court should, therefore, decline to hear this
appeal.

POINT I

THE COURT SHOULD DECLINE TO HEAR
THIS APPEAL ON THE GROUND OF MOOTNESS

This appeal is from a May 23, 1977 order of the United States District Court for the District of Connecticut, in which Judge Blumenfeld denied Appellant's motion:

(1) To intervene in this action for the purpose of modifying Trustee Order No. 3;

(2) To obtain a temporary injunction against the holding of the Avis Annual Meeting, then scheduled for May 25, 1977; and

(3) To obtain a temporary injunction against the Trustee voting for proposals (2) and (3) on the agenda at the Avis Annual Meeting, which proposals, in substance, were "anti-takeover provisions".

The following day, May 24, 1977, Appellant moved in this Court for an order directing that there be an expedited appeal from Judge Blumenfeld's order, and for a stay directed against the holding of the Avis Annual Meeting, or, in the alternative, enjoining Avis from tabulating or announcing a vote of common shares on the matters contained in proposals (1), (2), and (3).

Those issues are now moot for two reasons: (1) the Avis annual meeting was held on May 25, 1977, and the vote on proposals (1), (2) and (3) were tabulated and announced; and (2) Appellant's prayer for relief here does not include these issues. During the course of the oral argument on May 24, 1977, before this Court, counsel for Appellant acknowledged that Appellant's irreparable injury would first arise only when the Trustee consummated his contemplated public offering of two million Avis shares, which the Trustee stated he believed would occur sometime during the latter part of June. The Court (Feinberg, P.J., Danaher, J., and Dooling, J.) denied Appellant's motion for a stay, granted its request for an expedited appeal, directed that Appellant's brief be filed by June 1st and that Appellees' briefs be filed by June 9, 1977. The appeal was set for argument during the week of June 13th, and has since been set for June 16th.

Appellant's brief raises three legal issues. First, whether Judge Blumenfeld erred in denying Appellant's motion to intervene. This issue is moot, as we shall show below, because Judge Blumenfeld has set down a hearing for June 15th to consider an offer of \$20.25 for all Avis shares.

Second, whether this Court has plenary jurisdiction and should exercise that jurisdiction to amend Trustee Order

No. 3 to permit the Trustee to consider all proposals, including private offers to purchase the Avis shares held by the Trustee. The issue is moot because at the hearing scheduled for June 15th and presumably all offerors will be afforded an opportunity to appear and be heard.

Third, whether this Court should enjoin the Trustee from proceeding with his contemplated secondary offering of two million Avis shares to the public, pending the review of Trustee Order No. 3. This issue, although not properly before the Court since Appellant did not raise it in the district court, is also moot because the public offering has been cancelled.

Developments subsequent to this Court's order of May 24, 1977 have rendered all of the issues moot and this Court should decline to hear the appeal. On May 25, 1977 the Avis Annual Meeting was held as scheduled, and the disputed anti-merger proposals were adopted by a vote of 85% of the shares present at the meeting (including the Trustee's shares). Accordingly, Appellant has not continued on this appeal to press its application for injunction directed against the Annual Meeting or the Trustee's votes at the Annual Meeting.

On June 3, 1977, the Trustee received information from representatives of Norton Simon, Inc. ("NSI") that, subject to a favorable vote by its Board of Directors, it was prepared to make a cash offer of \$20.25* per share for

* This compares to Appellant's statement that it "intended", subject to certain conditions, to offer \$15.50 for each of the Trustee's 3,793,504 shares and a "tax free" exchange of Fuqua shares of at least equivalent value for the Avis shares owned by the public.

all the Avis shares held by the Trustee, and would commit to either a cash tender at the same price for all publicly held Avis shares or would affect a cash merger at the same price. The information was released to the public that day and at 3:45 p.m. the New York Stock Exchange suspended trading in Avis stock. On Monday, June 6, 1977, a formal offer from NSI was received by the Trustee, and the Trustee prepared his Fifth Report to the District Court of Connecticut, describing and attaching a copy of the NSI offer and requesting the court to issue an order authorizing and directing the Trustee to accept the NSI offer. On June 7, 1977, Judge Blumenfeld issued an order directing that a hearing be held before him on June 15, 1977, at 11:00 a.m. for the purpose of considering the NSI offer. The Trustee also advised the Court in his report that he had instructed his counsel to request counsel for Avis to notify the Securities and Exchange Commission that the pending Registration Statement relating to his proposed public sale was being withdrawn. Since that time Avis has filed a formal application to the Securities and Exchange Commission requesting the withdrawal of that Registration Statement.

It seems apparent that these recent developments have the following effect on the pending appeal:

1. The third issue presented on the appeal, whether the Trustee's secondary offering should be enjoined

pending the reconsideration of Trustee Order No. 3, has been rendered totally moot, inasmuch as that secondary offering has been withdrawn by the Trustee. There is presently no secondary offering by the Trustee pending.

2. The second issue presented on the appeal, whether this Court should consider reviewing and amending Trustee Order No. 3, has been rendered totally moot by the following circumstances: (a) the Trustee's own request that Trustee Order No. 3 be modified to permit him to accept the NSI offer in lieu of continuing with his plan to dispose of the shares through a series of public offerings, and (b) the district court's order dated June 7, 1977, directing that there be a hearing on June 15, 1977 for the purpose of modifying Trustee Order No. 3 and possibly authorizing or directing the Trustee to accept the NSI offer or such other offer that in the opinion of the court and the Trustee is more advantageous for the Trustee and the other Avis shareholders.

3. The first issue raised by the appeal, whether the lower court erred in denying Appellant's application to intervene for the purpose of moving to modify Trustee Order No. 3 has been rendered moot because the Appellant's stated purpose in seeking to intervene has now in fact materialized in the form of the district court's June 7th order, a copy of which was served upon Appellant, and June 15th scheduled hearing to consider the NSI offer. Appellant is now free

to appear at that hearing to present its existing offer or any amended offer, and any grievance that it may have will result from the actions taken at the June 15th hearing, and not from the Court's order of May 23rd.

It is fundamental and self-evident that no district court and no appellate court should enter a judgment or decide an issue which would be wholly ineffectual due to mootness. Local 8-6, Chemical & Atomic Workers v. Missouri, 361 U.S. 363 (1960); 7 Moore, Federal Practice, ¶65.21 at 65-158 (3d Ed. 1975). In those instances where a prayer for injunctive relief has been rendered moot by the time the issue was reached for appellate review, circuit courts have uniformly refused to rule on the issue. E.g., E. P. Hinkel & Co. Inc. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974); Hedberg v. State Farm Mut. Automobile Ins. Co., 350 F.2d 924 (8th Cir. 1965). Accordingly, since the NSI offer and Judge Blumenfeld's order to hold a hearing concerning private sales of the Trustee's shares have so significantly changed the underlying facts of this case as to render the issues raised by the Appellants on this appeal entirely moot, this Court should refuse to rule on the issues and should dismiss the appeal.

POINT II

THE DISTRICT COURT CORRECTLY
DENIED FUQUA'S APPLICATION
TO INTERVENE

A. The District Court Correctly Denied
Fuqua Intervention As of Right

Intervention as of right is governed by Rule 24(a) of the Federal Rules of Civil Procedure ("FRCP"), which reads, in relevant part, as follows:

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

To meet the requirements of FRCP 24(a)(2), the proposed intervenor must demonstrate that he has satisfied the following conditions:

- 1) That his application is timely;
 - 2) That he has an interest in the subject matter of the action;
 - 3) That such interest will be adversely affected by the disposition of the action;
- and

- 4) That such interest will not be adequately represented by the existing parties to the action. Vazman S.A. v. Fidelity International Bank, 418 F. Supp. 1084 (S.D.N.Y. 1976).

The district court denied Fuqua's application to intervene as of right, finding that Fuqua had not satisfied the first two conditions of FRCP 24(a)(2). We submit that the district court's decision is eminently correct and should not be disturbed by this Court.

1. Fuqua's Laches

The timeliness of an application to intervene, whether made under FRCP 24(a)(2) or 24(b), is a matter committed to the sound discretion of the district court, and is subject to review only for abuse of that discretion.

NAACP v. New York, 413 U.S. 345 (1973);

United States v. Associated Milk Producers, 534 F.2d 113 (8th Cir. 1976);

Chase Manhattan Bank v. Corporacion Hotelera de Puerto Rico, 516 F.2d 1047 (1st Cir. 1975);

Equal Employment Opportunity Commission v. United Airlines, Inc., 515 F.2d 946 (7th Cir. 1975);

Nevilles v. Equal Employment Opportunity Commission, 511 F.2d 303 (8th Cir. 1975);

United States v. International Business Machines Corp., 62 F.R.D. 530 (S.D.N.Y. 1974).

The language of the Supreme Court in NAACP v. New York, supra, is particularly apt:

Intervention in a federal court suit is governed by Fed Rule Civ Proc 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness.... Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

413 U.S. at 365-66 (1973) (footnotes omitted) .

In judging if an application to intervene is timely, whether the applicant was in a position to seek intervention at an earlier date has been deemed by the courts to be a significant factor.

Securities and Exchange Com'n v. Bloomberg, 299 F.2d 315, 320 (1st Cir. 1962);

American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co. 112 F.2d 669 (2d Cir. 1940);

United States v. International Business
Machines Corp., 62 F.R.D. 530 (S.D.N.Y.
1974);

Arthur G. McKee & Co. v. Gulf & Western
Industries, Inc., 52 F.R.D. 332 (D.Del. 1971);

The decision by the district court that Fuqua's application was untimely is based on a finding that Fuqua was guilty of laches. (261a) The district court found that Fuqua had ample opportunity to offer to purchase the Trust Property from the Trustee but that Fuqua chose, for reasons best known to it (179a), to refrain from making its proposed conditional offer until the eve of the shareholders' meeting.

Both Fuqua and its counsel were aware for many months of the manner in which the Trustee had intended to dispose of the Trust Property. As early as December 14, 1976, Fuqua's counsel had been aware that the Trustee was proceeding with a plan for a series of public offerings of the Trust Property. (179a) Nevertheless, Fuqua took no action until May 17, 1977, when it made its proposal in writing to the Trustee.

Judge Blumenfeld, in discussing the laches of

Fuqua, noted that Fuqua, knew or should have known about the Trustee's plans by early May 1977. Fuqua should have known these facts prior to that date in light of its counsel's admission that it was following the Avis situation as early as December 1976 (179a). The court also mentioned the fact that as early as April 20, 1977 the Trustee had filed a report with the court, which was a matter of public record, indicating the nature of the proposed shareholders' amendment which would be presented to the stockholders. (262a) Accordingly, Fuqua's assertion that there was no reason to make its offer to the Trustee or to intervene in this action until the eve of the shareholders' meeting is wholly unsupportable. Fuqua knew or should have known of the proposed anti-takeover amendments long before its belated application to the court for intervention.

Having been aware of the Trustee's then position with respect to private offerings and having been aware at the very least of an announcement in the Wall Street Journal on March 25, 1977 that the Trustee intended to make a secondary offering of approximately one-half of his Avis shares, Fuqua nonetheless chose to sit idly by until May 17, 1977, eight days before the Avis stockholders' meeting, before taking any action to protect its claimed "interest" in the Trust Property. Fuqua cannot be heard now to complain of the consequences of its own willful decision to delay in making

its application to the district court for intervention. Securities and Exchange Com'n v. Bloomberg, supra at 320. Fuqua has totally failed to sustain its burden to show that its delay was excusable. Nevilles v. Equal Employment Opportunity Com'n, supra at 305.

We submit therefore that the district court's finding that Fuqua's application was untimely was well within the discretion of that court and should not be disturbed by this Court.

2. Fuqua's Lack of Interest in the Subject Matter

The district court held that Fuqua as a would-be purchaser of Avis stock did not have a sufficient "interest" in the subject matter of this action to intervene as of right. We submit that this decision is correct and is supported by the weight of authority. Old Colony Trust Co. v. Penrose Industries Corp., 387 F.2d 939 (3d Cir.), cert. denied, 392 U.S. 927 (1968), supplies a ready answer.

The facts in Old Colony are remarkably similar to those presented on this application: There, plaintiffs commenced an action for a declaratory judgment that their proposed sale, subject to court approval, of certain pledged collateral held by them was "commercially reasonable" in accordance with Section 9-507(2) of the Pennsylvania Commercial Code. Following the proposed intervenors' tender to the court of a written offer to purchase part of

the pledged collateral for an amount which counsel for intervenors represented was substantially greater than the price offered by the original purchaser, proposed intervenors moved to intervene, praying that the court declare that their offer be accepted and that the prior offer be rejected. Intervenors' application to intervene was denied by the district court and on appeal the decision of the district court was affirmed, the court reasoning as follows:

In the district court the appellants claimed that they were entitled to intervene as of right under F.R.Civ.P. 24(a)(2) as amended in 1966. They did not claim, as they now claim alternatively, that they should have been granted permissive intervention under F.R.Civ.P. 24(b). However, we need not differentiate here because appellants' grievance throughout has been that they have a sufficient interest relating to the property or transaction, viz., the sale of the collateral, to be entitled to force the sale of the stock collateral to them if the court should find that their offer exceeds the Field offer. Consequently, if they lack such an interest, they are not entitled to intervene for that purpose under either provision of the intervention rule. The district court obviously decided that they lacked such an "interest," and we agree.

Appellants concededly had no cognizable interest in the pledged property or the various financial transactions involving it before this action was commenced. They were legal strangers. Their only claim of "interest" now is that they will pay more for the stock than Field has agreed to pay.... But even if the district court should find that the appellants'

offer is higher in value than the amount reflected in the Field agreement, it would not follow that plaintiffs would thereby be subject to an enforceable legal duty to sell the collateral to appellants, putting aside other offers. We say this because the relief requested by plaintiffs below was bottomed on 12A.P.S. § 9-507(2) (Supp. 1966) which, insofar as now pertinent, provides ... (citing statute).

* * *

Appellants' status as would-be purchasers does not clothe them in this type of proceeding with the type of "interest" which entitles them to intervene in this action for the purpose sought by them. 387 F.2d at 941 (footnotes omitted.)

Like the intervenor in Old Colony, Fuqua stands as a legal stranger in this litigation. As so aptly stated by the court in Old Colony, the status of a would-be purchaser does not clothe an intervenor with the type of "interest" which entitles it to intervene pursuant to the provisions of either Rule 24(a)(2) or Rule 24(b). See also United States v. 936.71 Acres of Land, State of Fla., 418 F.2d 551 (5th Cir. 1969).

Here, Fuqua has not demonstrated that it has a legitimate legal interest to be protected. Fuqua makes no allegation that it has, or even can, be harmed by the actions of the Trustee. The only claim which Fuqua made in the court below was that it would not make an offer if the anti-merger amendments were adopted at

the shareholder's meeting held on May 25, 1977. (Since those amendments were adopted, we fail to see any basis for Fuqua's appeal to this Court). The district court correctly noted that this is only a contingent interest, and one which is not cognizable under FRCP 24(a)(2).

Fuqua asserts that the Old Colony case was incorrectly decided. Old Colony is attacked principally on the ground that the decision by the Third Circuit ignores the decision of the Supreme Court of the United States in Cascade National Gas Corporation v. El Paso National Gas Company, 386 U.S. 129 (1967). We submit, however, that the Supreme Court's decision in Cascade lends no authority to Fuqua's position on this appeal, and we further submit that Fuqua's discussion of Cascade and its progeny is less than candid.

Perhaps the best discussion of Cascade can be found in Hobson v. Hansen, 44 F.R.D. 18 (D.D.C. 1968), a decision which Fuqua submits is enthusiastically supportive of the concept of "interest" found in Cascade that only in a practical sense must an intervenor show that he has an interest in the subject matter of that action.

Following almost immediately after the quotation from Hobson set forth at page 29 of the Fuqua brief, the Hobson court

stated as follows:

But while one's interest need no longer be decisively affected before intervention will be allowed, there is nothing in the new rule or in its attendant commentary to indicate that it effected a change in the kind of interest required. Thus the thrust of the revision seems clearly to be concerned with adequacy of representation and not with any notion of expanding the types of interests that will satisfy the rule. Still required for intervention is a direct, substantial, legally protectable interest in the proceedings.

(44 F.R.D. at 24) (Emphasis in original)

Fuqua's discussion with regard to whether an applicant may be substantially affected by the litigation (Br., p. 28) is, therefore, wholly beside the point. The revisions to FRCP 24(a) are concerned only with the adequacy of representation and "not with any notion of expanding the types of interests that will satisfy the rule" (44 F.R.D. at 24) (Emphasis in original).

As to what kind of pre-1966 "interests" which still must be shown before the Rule is satisfied, the court noted the following:

*** [M]ore specifically, "'interest' *** means a specific legal or equitable interest in the chose," Toles v. United States, 10 Cir., 371 F.2d 784, 786 (1967); "[t]he primary essential element that must exist *** is that [petitioner] have a direct personal or pecuniary interest in

the subject of the litigation," Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 7 Cir., 315 F.2d 564, 566, cert. denied, sub nom. Illinois v. Commonwealth Edison Co., 375 U.S. 834, 84 S.Ct. 64, 11 L.Ed.2d 64 (1963); "[a] party seeking to intervene *** must have some substantial legal interest to protect by his intervention," Greene v. Veren, D.Conn., 203 F.Supp. 607, 610 (1962).

(44 F.R.D. at 23).

Equally enlightening was the Hobson court's analysis of what effect, if any, the Cascade decision may have made on the interest requirements under FRCP 24(a)(2):

But Cascade should not read as a carte blanche for intervention by anyone at any time. For though Cascade's interest in the decree may have been somewhat remote, it did show a strong, direct economic interest, for the new company would be its sole supplier. In addition, the majority opinion reflects its irritation with the Justice Department for "knuckl[ing] under" to El Paso and with the District Court judge for ignoring the Court's mandate. It is, then, little wonder that the Court was extremely charitable with the intervenors. (44 F.R.D. at 25).

See also Note, Intervention, 89 Harv. L. Rev. 1174, 1177 f.n. 11 (1976).

Any effort by Fuqua to distinguish Old Colony by reference to the amicus curiae status granted the

proposed intervenors in that case is now moot. The district court has directed that a hearing be held on June 15, 1977 to determine whether the Trustee should make a private sale of the Trust Property to Norton Simon, Inc.; Fuqua has been given notice of that hearing and we are informed that Fuqua will be asserting its position with respect to the Trust Property at that time.

Equally unavailing to distinguish Old Colony is the argument advanced by Fuqua that the Trustee must make the most advantageous sale of the Trust Property. This argument is wholly inappropriate here. The Trustee is under no duty to sell to the highest bidder where such sale, in the Trustee's judgment, would tend to impair the interests of some or all of the other interested parties.

The court below further relied upon the decision in Solien v. Miscellaneous Drivers & Helpers Union Local No. 610, 440 F.2d 124 (8th Cir.) cert. denied, 403 U.S. 905 (1971), that Fuqua could not intervene as of right. The Solien case does nothing more than state the obvious: a party who does not state a cause of action has no basis to be before the court, whether in an original action or

by way of intervention. The district court correctly noted that "Fuqua has no right to demand that the Trustee sell his shares to him. It may be an eager suitor but it has no right at all". (267a) Fuqua does not dispute the district court's finding, but, rather, advances a distinction which is wholly beside the point. (App. Br., p.38) The question here is not whether Fuqua is precluded by statute from making its offer but rather whether it has any statutory or common-law right to require that the Trustee sell the Trust Property to it. See also Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973); and Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316 (S.D. Fla. 1973).

A case-by-case analysis of the authorities cited in support of Fuqua's position that intervention should have been granted by the court below is not warranted. Fuqua as a would be purchaser is a mere stranger to Avis and to the issues involved in these proceedings. It has no personal or pecuniary interest in the outcome of these proceedings. In contradiction to Fuqua, the petitioners in each and every case cited in Fuqua's brief (App.Br.,pp 29-32), were immediately affected by the proceedings wherein they sought to become parties.

There is no need for this Court to reach the question of the adequacy of representation. The district court did not consider this question because it correctly held that Fuqua's application was untimely and because it properly found that Fuqua had failed to allege a sufficient interest to permit it to intervene. However, should this Court feel constrained to consider this issue, we wish to point out to the Court that Fuqua's arguments with respect to the adequacy of representation (App. Br., pp 38-40) are grossly misleading, for the following reasons:

1. Contrary to what is stated by Fuqua, the burden of proof with respect to the issue of adequacy of representation rests squarely with the moving party [Edmondson v. State of Nebraska, 383 F.2d 123 (8th Cir. 1967); Levin v. Mississippi River Corporation, 47 F.R.D. 294 (S.D.N.Y. 1969)], and Fuqua has not met that burden;

2. The district court is afforded considerable discretion in passing upon the adequacy of representation; [See Hodgson v. United Mine Workers, 473 F.2d 118, 125 n.36 (D.C. Cir. 1972)]; and

3. The United States as a party to this action is more than able to protect the rights and interests of all the parties involved, and has so represented this fact to the district court in connection with the application to intervene.

B. The District Court Correctly Denied
Fugua the Right to Intervene Permissively

FRCP 24(b) provides in pertinent part as follows:

(b) Permissive intervention. - Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Standards for judicial review of a denial of permissive intervention are well settled. As this Court stated in Securities and Exchange Commission v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972), the district court has broad discretion to determine the grant or denial of permissive intervention. From this rule it follows that an appeal from the denial of permissive intervention may be reviewed only for a clear abuse of discretion. Brewer v. Republic Steel Corp., 513 F.2d 1222 (6th Cir. 1975); Edmonston v. State of Nebraska, supra; Francis v. Chamber of Commerce of United States, 481 F.2d 192 (4th Cir. 1973).

In reviewing an appeal from the denial of permissive intervention, the issue, as the court stated in Korloth v. Briscoe, 523 F.2d 1271, 1278 (5th Cir. 1975), is not whether there were factors rendering permissive intervention appropriate, "but whether the trial court committed a clear abuse of discretion in denying the motion." Stated another way: judges may properly reach different decisions with respect to motions for permissive interventions in generally similar circumstances. See Brewer v. Republic Steel Corp., supra.

The requirement that an intervenor establish a sufficient "interest" in the subject matter of the litigation is equally applicable with respect to the standards to be applied under FRCP 24(b). As stated by the Third Circuit in Old Colony previously quoted at length herein,

[W]e need not differentiate here [between the standards for intervention under FRCP 24(a) and (b)] because appellants' grievance throughout has been that they have a sufficient interest relating to the property or transaction... Consequently, if they lack such an interest, they are not entitled to intervene for that purpose under either provision of the intervention rule.

(387 F.2d at 941).

It is submitted, therefore, that Fuqua's application is equally flawed whether considered under FRCP 24(a)(2) or FRCP 24(b).

There are strong and valid reasons why the court below refused to permit Fuqua to intervene. As was stated by Judge Wyzanski and quoted with approval in British Airways Bd. v. Port Auth., 71 F.R.D. 583, 585 (S.D.N.Y. 1976):

"It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention."

POINT III

THIS COURT LACKS JURISDICTION TO HEAR THIS APPLICATION

An intervenor cannot create jurisdiction if it does not exist or if it is not otherwise proper as between the original parties to the action. Davis v. Jury Commission of Montgomery County, 261 F.Supp. 591 (M.D. Ala. 1966). Intervention should not be allowed to expand

federal jurisdiction by bringing before the court controversies which could not originally have been brought in federal court. Isbrandtsen v. S.S. Kokoh Maru, S.S. Kochu Maru, 263 F.Supp. 784 (S.D.N.Y. 1966). See also Gentry v. Hibernia Bank, 154 F.Supp. 62 (N.D. Cal. 1956).

As demonstrated in Point II, supra, Fuqua has not shown that it should be granted intervention as of right. Accordingly, it must show an independent ground to support federal jurisdiction.

In Reedsburg Bank v. Apollo, 508 F.2d 995 (7th Cir. 1975), the court stated:

The general rule is that permissive intervention in an in personam action other than a class action must be supported by independent grounds of jurisdiction... The rationale for this rule is that... [i]n an in personam action,... when the only basis for intervention is a common question of law or fact, there is no compelling reason to permit the litigation of a claim or a defense that could not have been asserted had the intervenor been an original plaintiff or defendant.

(508 F.2d at 1000).

From the face of the plaintiff-intervenor's proposed complaint, it is plain that this Court does not have jurisdiction to hear this application. Both plaintiff-intervenor and defendant-intervenor are incorporated

under the laws of the State of Delaware and thus there is no complete diversity of citizenship between the parties.

Fuqua can take no solace from the fact that this action was originally commenced by the United States to seek divestiture from ITT of its interest in Avis. Fuqua's claim is not predicated upon any violation of the anti trust laws. It is well established that with regard to an action in admiralty, a claim by an intervenor asserting non-maritime issues cannot be heard unless independent jurisdictional grounds are shown to be present. Isbrandtsen v. S.S. Kokoh Maru, S.S. Kochu Maru, supra. See also, Overseas Trading Corporation v. Clumberhall, 85 F.Supp. 905 (S.D.N.Y. 1949). We submit that this rule has equal application in the context of an antitrust action.

POINT IV

THIS COURT HAS NO JURISDICTION
TO AMEND TRUSTEE ORDER NO. 3

- A. The district court has directed that there be a hearing on June 15, 1977, to consider amending Trustee Order No. 3 to permit the Trustee to dispose of his Avis stock through private sale and the issue is accordingly moot.

As is more fully set forth in Point I of this brief, as a result of the NSI offer received by the Trustee on June 6, 1977, to purchase the Trustee's shares (and subsequently by cash tender offer or merger all outstanding shares) at \$20.25, the Trustee has filed a Fifth Report with the District Court, and the District Court has scheduled a hearing on June 15th to consider that offer. Accordingly, Trustee Order No. 3 which directs that the Trustee dispose of his Avis stock through a series of public secondary offerings will be reconsidered at that time and parties who have an interest in making private bids are presumably free to do so at that time. The relief requested in Point II of Appellant's brief has, therefore, for practical purposes been provided by the district court's order directing that hearing. That being the case, there is nothing further for this Court to consider on this issue.

Should there be any reason for the Court to consider the request for an amendment to Trustee Order No. 3 as contained in Point II of Appellant's brief (which Appellees doubt) the remainder of this Point is addressed to the merits of such request.

- B. The Court of Appeals cannot order the amendment of Trustee Order No. 3 since this issue was not raised before the court below.

Appellant's Notice of Appeal (276a) indicates that this is an appeal from:

"...each and every part of an order of the Honorable M. Joseph Blumenfeld of the United States District Court for the District of Connecticut, dated May 23, 1977, denying, inter alia, the motion of Fuqua to (i) inter-vene in this action and (ii) enjoin defendant Avis, Inc., from holding the forthcoming annual meeting of its stockholders scheduled to take place on May 25, 1977."

Appellant's brief now, for the first time, asks this Court to amend Trustee Order No. 3 to permit the Trustee to accept private offers for his Avis shares. Appellant seeks this relief despite the fact that this issue was never brought before the district court, despite the fact that Judge Blumenfeld gave no consideration to it and made no ruling on it, and despite the fact that it is not the subject of the notice of appeal.

As a general rule, a reviewing court may not consider issues raised for the first time on appeal, and claims which were not raised in the district court can not be presented for the first time to the Court of Appeals. Hormel v. Helvering, 312 U.S. 552 (1941); United States v. Vitasafe Corp., 352 F.2d 62 (2d Cir. 1965); Schwartz v. S. S. Nassau, 345 F.2d 465 (2d Cir.), cert. denied, 382 U.S. 919 (1965). This Court has recently said that:

Adherence to the rule is particularly apt where as here factual questions may have been implicated as to which the [trial] judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court... Terkildsen v. Waters, 481 F.2d 201, 204-205 (2d Cir. 1973).

It is clear that such "factual questions" are present in regard to the continued existence of Trustee Order No. 3. The affidavit of Roderick S. Dowling submitted in support of Appellant's motion (19a) illustrates that Appellant itself envisioned a two-step process in its efforts to acquire Avis. In paragraph 13 of said affidavit (25a) Dowling indicates that Appellant's first step would be to enjoin the stockholder's meeting pending a favorable determination of Appellant's motion to intervene. Then:

"should Fuqua's motion to intervene be granted, it will immediately serve and file the complaint to intervene... and then promptly move to amend Trustee Order No. 3 to permit the proposed purchase. At that time, Fuqua intends to present further evidence regarding the benefits of the proposed purchase to all concerned parties."

Neither the Appellant nor the Appellees argued the merits of preserving Trustee Order No. 3 in the court below. Neither side produced "evidence" on either side of the issue. At oral argument before Judge Blumenfeld, counsel for Appellant set forth its case as follows:

"...I represent Fuqua Industries, who seek to intervene in the action to the end that we may apply to the Court for an order amending the Trustee's Order Number 3 to permit the Trustee to act upon and hopefully to accept the Fuqua offer.

We also ask the Court to take the appropriate action to defer the annual meeting until this Court and the Trustee, and whoever else establishes appropriate interest, can study the Fuqua offer." (174a)

Thus, having consciously decided not to initially raise the issue of the amendment of Trustee Order No. 3, and having now attempted to revise its two-step strategy, Appellant should not be permitted to escape the consequences of the established rule that new relief cannot be requested for the first time at the appellate level.

In Meccano Ltd. v. John Wanamaker, 250 Fed. 450 (2d Cir. 1918), aff'd, 253 U.S. 136, 40 S.Ct. 463, 64 L.Ed. 822 (1920), the Supreme Court said that the appellate power of the circuit courts may not necessarily be limited to mere consideration of, and action upon the order appealed from; if "insuperable objection" to maintaining the action appears, it may be dismissed and the litigation may be terminated. Thus, in limited circumstances, the court of appeals may exercise its plenary jurisdiction to dismiss a case. The court of appeals may not, however, grant affirmative relief sought by the plaintiff for the first time on appeal.

In the case principally relied on by Appellant, Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966), cert. denied, 385 U.S. 971 (1966), the plaintiffs had sued to restrain the survivor of a merger of two unions from forcing members of the pre-existing union to sign a non-Communist oath. The district court denied plaintiff's motion to enjoin the election in regard to the merger. On appeal of this decision after the election, the plaintiffs sought a mandatory preliminary injunction ordering the surviving union to admit the plaintiffs to membership in the survivor union pendente lite. The court noted that while the plaintiffs' motion for a preliminary injunction was moot to the extent it sought to interfere with the election, the district court's denial of plaintiffs' motion in regard to the

requirement of signing the oath was not. The court of appeals reversed the lower court, holding that the plaintiffs should prevail on the merits because the oath was a "per se unreasonable requirement" for union membership. In reaching this decision, the court said:

As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further than is necessary to decide the interlocutory appeal. (citations omitted) However, this rule is subject to a general exception - the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of merit. (citations omitted) Such an exception serves the obvious interest of economy of litigation, and this interest is equally served if the appellate court directs a verdict for plaintiff in an appropriate case. We have found no case reaching this result, but this is not surprising since it is the rare case that contains no triable issue of fact, and it is rarer still that this would result in a judgment for the plaintiff at the pre-trial stage.
(364 F.2d at 70).

Obviously the narrow area of plenary jurisdiction recognized in the Hurwitz decision is not before the Court in this case. Appellant seeks to have this Court fashion a totally new form of summary affirmative relief. The authorities do not permit such relief to be initially sought at the appellate level.

POINT V

EQUITABLE RELIEF IS WHOLLY
INAPPROPRIATE IN THIS PROCEEDING

As previously pointed out herein, there is no presently pending or contemplated secondary offering to enjoin. Hence, the relief requested in Point III of the Appellant's brief has been rendered moot by subsequent events between the date of the district court's decision and the date that the appeal is scheduled to be heard.

Should there be any reason for the court to consider the request for injunctive relief contained in Point III of Appellant's brief, which Appellees doubt, the remainder of this Point is addressed to the merits of the request.

The specific question before the district court was whether a preliminary injunction should be granted against the holding of the shareholders' meeting scheduled for May 25, 1977. In that connection, the court below correctly following the criteria set forth in Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973), held that such an injunction should not issue, and, in fact, the shareholders' meeting was duly held on May 25th. The question of enjoining the secondary offering was not raised as an issue either in the pleadings

or in the motion submitted by Fugate to the district court. Accordingly, Judge Blumenfeld did not consider it. The Trustee respectfully submits that the Court of Appeals cannot review the question since it has not been raised by Appellant in its Notice of Appeal, and was not presented for decision to the court below.

Appellant cites cases in its brief to the effect that occasionally an appellate court may, in the interest of judicial economy, review matters beyond the specific and narrow matter presented as the question on appeal. However, at no point does Appellant cite any authority for the proposition that an appellate court may review a matter which was not even contemplated by the court below. In fact, no such authority is known.

Courts of appeal, in reviewing district court orders, have occasionally reviewed matters concomitant to the question on appeal, such as jurisdiction of the district courts. Shapiro, Bernstein & Co. v. Continental Record Co., 386 F.2d 426 (2d Cir. 1967). However, this does not suggest that appellate courts may review entirely new and distinguishable matters never presented to the court below. Courts have consistently ruled that upon consideration of appeals from the issuance or denial of preliminary injunctions, the

appellate court will not dispose of the case on its merits. Di Giorgio v. Causey, 488 F.2d 527 (5th Cir. 1973). Similarly, in Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941), the court held that:

Although we have jurisdiction to review that part of the judgment having to do with injunctive relief, that does not bring before us any other part of the judgment.
(120 F.2d at 86)

The Second Circuit held, in Sheridan v. Liquor Salesmen's Union, 444 F.2d 393 (2d Cir. 1971) that the jurisdiction of the Court of Appeals was limited to reviewing a ruling on interrogatory injunctive relief.

Similarly, the First Circuit, in Loew's Drive-In Theatres v. Park-In Theatres, 174 F.2d 547 (1st Cir. 1949), held:

For although injunctive relief is granted in a judgment appealed from and we have appellate jurisdiction over such judgments under 28 U.S.C.A. §1292(1) even through interlocutory, we have jurisdiction to review only that part of such judgments as have to do with the injunctive relief afforded and no other...(citing Caterpillar).
(174 F.2d at 550)

Some cases cited in the Appellant's brief stand for the proposition that appellate jurisdiction is not so narrowly circumscribed as to preclude considerations of

questions other than those specifically certified or regarded as controlling by the district court judge. Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975), cert. den., 423 U.S. 1018 (1975); Capitol Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974); E. P. Hinkel & Co., Inc. v. Manhattan Company, 506 F.2d 201 (D.C. Cir. 1974). Although these cases do suggest that an appellate court may examine matters extending beyond the narrow question that they may have been regarded as controlling by the district court judge, these cases do not cover the situation presented in the case at bar. We not here have the situation where the district court has certified a single question for review by the appellate court. Here, Appellant has specifically appealed from the denial of an order enjoining the stockholders' meeting. The question of an injunction against the secondary offering was not raised or briefed by Appellant and was not ruled upon or considered at any point by the district court judge. Therefore, appellate review of that issue is not before this court.

Fuqua has presented no authority for the proposition that an appellate court may review a matter which was not even presented for the consideration of the court below. On the contrary, controlling case law authority

states that, as a general rule, when a party appeals from the grant or denial of injunctive relief, the appellate court will not go beyond the district court's order in deciding the interlocutory appeal.

CONCLUSION

The order appealed from should be affirmed in all respects.

Respectfully submitted,

E. TIMOTHY McNAMARA
Attorney for Trustee
Office & P. O. Address
102 Oak Street
Hartford, Ct 06106
(203) 248-8458

Of Counsel:

WHITMAN & RANSOM
Office & P. O. Address
522 Fifth Avenue
New York, New York 10036
(212) 575-5800

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff

against

AFFIDAVIT
OF
SERVICE

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
and THE HARTFORD FIRE INSURANCE COMPANY,

Defendants

and

AVIS, INC.

Defendant-Intervenor-
Appellee

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

KENNETH J. MARTE, being duly sworn, deposes and
says:

I am over the age of 18 years and in the employ
of Whitman & Mansom, of counsel to F. Timothy McNamara,
attorney for the Trustee. I am not a party to this action.

On the 9th day of June, 1977 I served the Trustee-
Appellee's Supplemental Appendix and the Brief for the
Trustee-Appellee on the attorneys listed below at the addresses

designated by said attorneys for that purpose by depositing a true copy of same, securely enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service located in the lobby of 522 Fifth Avenue, New York.

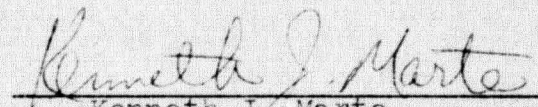
Davis Polk & Wardell, Esqs.
One Chase Manhattan Plaza
New York, New York 10005

Matthew E. Jaffe, Esq.
Antitrust Division
Department of Justice
Washington, D.C. 20530

Berdon, Young & Einhorn, P.C.
132 Temple Street
New Haven, Connecticut 06510

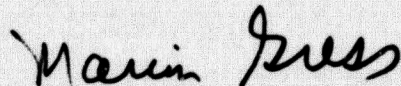
Ribicoff & Kotin, Esqs.
799 Main Street
Hartford, Connecticut 06103

Wolf Popper Ross Wolf & Jones, Esq.
845 Third Avenue
New York, New York 10022


Kenneth J. Marte

Sworn to before me

this 9 day of June, 1977.



MAVIN GRESS
NOTARY PUBLIC, State of New York
No. 03-6655275
Qualified in Bronx County
Commission Expires March 30, 1978

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